



No. 117.

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In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT, }
v. } No. 117.
M. SALAMINER.

ON A CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

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The brief for the appellee states correctly the facts upon which the question in the circuit court of appeals was certified in this case. The United States, however, disclaims the implications contained in the note and memorandum and the *italics* embracing "chocolate" and "sweetened chocolate," on pages 1 and 2 of his brief.

ARGUMENT.

I.

The only question here relates to the sufficiency of the protest.

The significant language of the protest is: "I, claiming that the said goods under existing laws are dutiable at 2 cents per pound and the exaction at a higher

rate is unjust and illegal, * * * claim to have the amount unjustly exacted refunded." The goods consisted of sweetened chocolate in tablets manufactured from cocoa and sweetened with sugar. The protest was against the duty assessed "on chocolate imported by me" (Ctf., p. 1). The question of the proper rate of duty on the goods is not really involved here, but the settlement of that rate may be briefly reviewed in order to reach a full understanding of the case.

In *Arthur v. Stephani* (96 U. S., 125) Mr. Justice Hunt shows that tariff legislation from an early day differentiated chocolate by duty *co nomine* from confectionery. The tariff act of 1883 preserved the distinction (22 Stat., 502, 504), as did the act of 1890 (26 Stat., pp. 584, 588, pars. 238, 239, 318, 319), which, however, enlarged the classification by providing for "chocolate confectionery" (pars. 238, 239). Under the latter act the cases *In re Austin et al.* (47 Fed. Rep., 873) and *In re Schilling et al.* (48 Fed. Rep., 547; 11 U. S. App., 604) arose, and determined that "sweetened chocolate" was properly dutiable, not under paragraph 239 of the act of 1890, covering "all other confectionery, including chocolate confectionery," and the similitude clause of the act (sec. 5, p. 613) providing for the same duty on unenumerated articles similar in material, quality, texture, or use as upon enumerated articles which they most resemble; nor under paragraph 338, covering "chocolate other than chocolate confectionery and chocolate commercially known as sweetened chocolate," but under paragraph 319, covering "cocoa, prepared or manufactured, not specially provided for in this act."

In these determinations of the proper paragraph applicable to sweetened chocolate the United States has acquiesced, and does not question their correctness.

In the case of *Schilling et al.*, no question of the sufficiency of the protest was raised. In the case of *Austin et al.*, the importers in their protest relied upon paragraph 318, and the court determines that for this reason they can not avail of the provisions of paragraph 319. Both the foregoing cases determined that the parenthesis in paragraph 318, excepting "chocolate, commercially known as sweetened chocolate," as well as "chocolate confectionery," from its provisions, could not be changed under the rule of interpretation, disregarding punctuation in order to effect the obvious intent of the legislature, so as to include only the latter and exclude the former phrase, and thus subject "chocolate, commercially known as sweetened chocolate," to paragraph 318. Upon a similar protest, the ruling in the case *In re Austin et al.*, was followed in *Cadenas & Co. v. United States*. (11 U. S. App. 792.)

So much for the proper rate of duty applicable and the insufficiency of protests in which classification under an inapplicable paragraph is mistakenly relied upon by the importer, notwithstanding the fact that the rate of duty under the inapplicable and the applicable paragraph is the same.

II.

But the question here is not as to the rate of duty, but as to the legal sufficiency of the protest under determinations of this court.

The Board of Appraisers were of opinion that the protestants having claimed that the merchandise was "chocolate or sweetened chocolate," should not under the circumstances be deprived of their remedy by reason of having failed to "*specifically* claim classification as manufactures of cocoa under paragraph 319." (Ctf., pp. 1, 2, sec. 3; appellee's brief, p. 5.) So far as the protest shows (and the question is as to the protest) the importers did not claim that the goods were "chocolate or sweetened chocolate," but that they were "chocolate." The court below (the circuit court) shows that the goods were invoiced as "chocolate and other manufactures of cocoa," and were returned by the appraiser as "sweetened chocolate as confectionery;" and the opinion concludes:

As the goods were chocolate, and the rate claimed in the protest was the rate on that, it seems to set forth "distinctly and specifically" the reasons for the objection to a sufficient extent. [Citing *Arthur v. Morgan*, 112 U. S., 495.]

But the goods were not chocolate, but sweetened chocolate, and the mere fact that the rate applicable to chocolate under one paragraph, and to sweetened chocolate and other manufactures of cocoa under another, was the same, does not help the protest to set forth distinctly and specifically the reasons for the objections to the duty assessed. It may be admitted that to constitute a sufficient protest it is not essential to individuate the paragraph under which the claim is made, but it is necessary that the protest should set forth distinctly and specifically in some intelligible form the reasons for the objections, and the

* NOTE.—The case of *United States v. Salambier* (circuit court) does not appear to be reported. The citation above given is taken from the record of the case in the circuit court of appeals, page 12.

United States submits that, tried by this test, the protest herein was not good and sufficient under existing law.

III.

The requirements affecting a protest as laid down in section 14 of the customs administrative act have been long embodied in our statutes. A protest must be in writing and must set forth distinctly and specifically in respect to each entry or payment the reasons for the objections to the collector's decision as to the rate and amount of duties chargeable upon the imported merchandise. It is not necessary to ask the court to dwell upon the evolution of these requirements as drawn from previous legislation, nor to follow in detail the course of adjudication upon the subject. The laws governing protests have used the same language as to setting forth the objections since 1845, and this language passed over into the Revised Statutes and the customs administrative act without change. (Act of February 26, 1845, 5 Stat., 727; act of June 30, 1864, sec. 14, 13 Stat., 202; Rev. St., sec. 2931; *In re Sherman et al.*, 55 Fed. Rep., 276.) The adjudications of this court upon the subject prior to the act of June 10, 1890, are therefore of full authority on this case.

The principles determined applicable here are substantially as follows:

A protest against a rate of duty setting out the objection that the goods should have been assessed under another classification than the collector's is insufficient if in fact the assessment should have been made under a third classification as to which the protestant made no

claim; it makes no difference if the rate was the same under the classification claimed and the proper classification; the classification claimed must be indicated with reasonable clearness sufficient to point out which classification was intended, and the importer can not take advantage of a ground of objection not set out specifically in his written protest; a protest merely against a rate of duty is not sufficient. (*Mason v. Kane*, Taney, 173; *Thompson v. Maxwell*, 2 Blatchf., 385; *Darics v. Arthur*, 96 U. S., 148; *Herrmann v. Robertson*, 152 U. S., 521; *Persson v. Russell*, 152 U. S., 577, and many cases in the courts below following these decisions in addition to those cited *supra*.)

The courts exact strict compliance with the conditions of a valid protest in order to apprise the collector of the nature of the objection before it is too late to remove it or modify the exaction, and that the proper officers of the Treasury may know what they have to meet in case they decide to disregard the objections and expose the United States to the risk of litigation. (*Darics v. Arthur*, *supra*.) Upon this point Chief Justice Taney, when sitting as circuit judge, says (*Mason v. Kane*, Taney 173, 177, 178, 179):

The object of this provision is to prevent a party from taking advantage of such objections when it is too late to correct them, and to compel him to disclose the grounds of his objection at the time when he makes his protest. * * * They [the United States] have granted this privilege * * * upon condition that the claimant * * * shall give a written notice that he regards the demand as illegal and means to contest the right of the United States

in a court of justice, stating also at the same time distinctly the specific grounds upon which he objects. This is the condition upon which he is permitted to sue, * * * and thus to appeal from the administrative to the judicial department. * * * It is a condition precedent.

If a protest merely against a rate of duty is not sufficient, a protest simply claiming another rate without specifying in some way how or why it is applicable would appear on a parity of reasoning to amount to the same thing and to be equally futile. But the appellee claims that the protest here was sufficiently specific and apprised the collector of the nature of the objection. Let us examine it to see if this be so, and whether it meets the foregoing tests. It calls the goods "chocolate" when in point of fact they were sweetened chocolate. It protests against the rate assessed. It claims that the goods "under existing laws are dutiable at 2 cents per pound." That is all, for the remaining language is merely a corollary or consequence of the foregoing—that the exaction of a higher rate is unjust or illegal, and that the protestant pays the duty to obtain possession and claims a refund. A protest could not well be more bare and uninformative or less responsive to the legal requirements. It does not state a single reason why the duty assessed was wrong, or why another rate of duty was right.

Without dwelling on the fact that many articles under the act of 1890 besides sweetened chocolate (incorrectly called chocolate in the protest) were properly dutiable at 2 cents per pound, the importer can not read into his protest later decisions of the courts fixing the right rate

of duty and determining the paragraph properly applicable. The decisions in the *Austin* and *Schilling* cases are subsequent in date to the protest. The importer by his protest told the collector that he was wrong, but did not tell him wherein he was wrong; and the question is not whether the collector is right, but whether the importer is right. If we take the most liberal construction, and hold that the words of the protest used simply to designate the merchandise (but not to define or qualify it properly, for the designation was incorrect) are a part of the protest proper, then it may be held to read: "I claim that the merchandise is chocolate and is dutiable under existing laws at the rate of 2 cents a pound." But this certainly does not call the attention of the collector distinctly and specifically or with reasonable clearness to any particular paragraph under which the merchandise should be classed; or if it does, the paragraph pointed out by this language is paragraph 318, which is not the correct paragraph. The collector can not regard objections, however logically deduced, when the protest fails to make them in clear and precise terms. There is no authority to allow the importer to make a new protest. (*In re Sherman, Creil & Co.*, 55 Fed. Rep., 276, 278.)

But, says the counsel for the appellee, there is a valid distinction to be made. It is true that protests that rely upon a paragraph not properly applicable, and which fail to point out the applicable paragraph, are to be held insufficient; but when the protest does not commit itself so far, but claims the right rate, and is silent as to the proper paragraph, or as to any provision for or indication of classification except the rate of duty, the protest,

nevertheless, does set forth the grounds of objection sufficiently. In other words, when, as a matter of fact, no other rate is applicable to the goods than the one named in the protest, and the rate assessed is complained of as illegal, the collector, who ought to know the law, and follows the rulings of the General Appraisers and the decisions of the courts (although both one and the other in this case were subsequent to the protest in time), is sufficiently apprised within the law; and the learned counsel calls attention to the cases of *Heinze v. Arthur's Executors* (144 U. S., 28) and *Herrman v. Robertson* (152 U. S., 521, 526) as illustrating this distinction. In the latter case the importers did not assert that the goods were not within the clause relied upon by the collector, except by claiming that they came under another portion of the same clause, which was likewise held to be incorrect. And it is to be pointed out in passing that the court said in that case: "The protest failed to point out, or suggest in any way, the provision which actually controlled," thus stating the Government's contention here.

But conceding for argument's sake that the case merely decides that a protest which specifies the wrong paragraph is insufficient, let us examine the case of *Heinze v. Arthur's Executors*. This case determined in effect that a protest which complained that goods "composed of cotton and silk, cotton chief part," should not be assessed with the duty on certain silk goods, "the duty on silk goods being only legal where silk is the chief part," distinctly and specifically called the attention of the collector to the ground of objection and the statutory provisions necessarily involved. We fail to see how any

consideration or comparison of this case supports the distinction which the counsel for the appellee seeks to draw. His argument amounts to this: although a protest which points out and relies on an inapplicable paragraph is insufficient, one which indicates no paragraph at all and specifies no cause for objection except that the rate assessed is erroneous and that another rate applies, is sufficient where the rate named is the proper rate (under a paragraph which covers the goods, not, however, indicated in the protest), although it may also be the proper rate under a distinct paragraph covering similar but different goods, because the importer has thereby done substantially all he ought to do or could reasonably do to apprise the collector of the nature and basis of his objection.

But the appellee can not so escape; he could and ought to have made an alternative claim by reference to both paragraphs 318 and 319, or by designating the merchandise covered by them respectively, in the list of one or the other of which his own goods should have been claimed to be included. He should have indicated with reasonable clearness which classification was intended, and then no criticism could have been passed on his protest and it would clearly have been sufficient.

IV.

The Government contends that the criticism contained in the foregoing rules laid down in the adjudicated cases is destructive to the validity of the appellee's protest.

To enforce this contention, it will be proper to consider briefly the language of some of the authorities and

to point out the distinctions between *protestation* and the one at bar.

In *Greely's Administrator v. Beeson* (18 How., 413, 417), in reference to a protest against advance of value on an invoice on the specifically stated ground of unfair and unfaithful examination by the appraisers, the court said:

We are not therefore disposed to exact any nice precision, nor to apply any strict rule of construction upon the notices required under this statute. It is sufficient if the importer indicates distinctly and definitely the source of his complaint, and his design to make it the foundation for a claim against the Government.

It is to be noted that Mr. Chief Justice Taney, in dissenting with Mr. Justice Daniel and Mr. Justice Nelson, was of opinion that the grounds of objection were not distinctly and specifically set forth, and that the protest did not apprise the collector of the objection taken.

Davies v. Arthur (96 U. S., 148) overthrew a protest on the ground that no objections to the duty assessed could be heard except those alleged in the protest, and reviews the pertinent principles and the decisions in which they were laid down. The language of the court is (p. 151):

Technical precision is not required, but the objections must be so distinct and specific as when fairly construed to show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character, to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the

defect if it was one which could be obviated. [Citing *Burgess v. Converse*, 2 Curtis, 223.]

Frazee v. Moffitt (20 Blatchf., 266) sustained a protest "against any greater rate of duties than at the rate of 10 per cent *ad valorem* for the reasons and on the grounds that no higher rate * * * can lawfully * * * be charged," because the rate assessed as well as the rate claimed were applicable to the merchandise under the same section of the Revised Statutes (sec. 2516), providing for duty on not enumerated unmanufactured articles on the one hand (which the court held properly included the merchandise) and on not enumerated manufactured articles on the other hand, into which class the collector claimed that the merchandise fell, the court saying that the collector having acted under the said section in imposing the higher duty, the language of the protest fairly referred him to the 10 per cent clause of the same section.

In *Arthur v. Dodge* (101 U. S., 34) the protest pointed out by reference to dutiable provisions why under then existing laws the assessment was erroneous, and hence sustained the protest as sufficiently notifying the collector of the true nature and character of the objection taken.

So by "personal effects used over a year" the court held that the protest in *Arthur v. Morgan* (112 U. S., 495) apprised the collector that a carriage claimed to be free was so claimed under clause 1 of section 2505 of the Revised Statutes as "household effects * * * used abroad for more than one year," and not under clause 2 or clause 3, neither of which contained the

limitation as to time of use. The collector, therefore, could not fail to understand the clause in mind.

In *Schell's Executors v. Fauché* (138 U. S., 562, 567), the protest claimed that under existing laws the goods were only liable to a duty of 19 per cent as a *manufacture of worsted*. The court held that the collector could have no doubt in his mind that the importer's intention was to object to the failure to classify the goods as a manufacture of worsted, and ruled that a protest which indicates to an intelligent man the ground of the importer's objection should not be discarded because of the brevity with which the objection is stated.

The cases of *Heinze v. Arthur's Executors* (144 U. S., 28) and *Herrman v. Robertson* (152 U. S., 521) have been sufficiently referred to *supra* in discussing the distinction raised by counsel for the appellee. The following quotation from the opinion of the court in the latter case is, however, applicable here :

The protest failed to point out or suggest in any way the provision which actually controlled, and in effect only raised the question which of two clauses, under one or the other of which it was assumed that the importation came, should govern as being most applicable.

The fact that the rate was the same in the present case can not be made to "suggest the provision which actually controlled."

V.

Finally, the appellee earnestly claims that to hold the protest insufficient would be unjust as well as illegal, and refers to the appellee's equity.

This is not a case in which to seek for underlying equities; there are none. The reasons for holding importers to a strict compliance with the law are stated *ante* in the quotation from Chief Justice Taney in *Mason v. Kane*, and the other authorities cited. We think, in view of these reasons, one proper purpose of the law is protective to the Government, and that the decisions abundantly show that it is legal and not illegal to hold this protest insufficient; and if it is legal to hold it so, it is not unjust.

It is respectfully submitted on behalf of the United States that the question of the circuit court of appeals should be answered in the negative.

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